United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To Be Argued By

JOEL A. BRENNER

76-2031

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-2031

NICHOLAS RATTENNI,
Petitioner- Appellant,

-v-

GEORGE C. WILKINSON, Warden, FCI, Danbury, Connecticut, ATTORNEY GENERAL OF THE U.S., U.S. BOARD OF PAROLE, BUREAU OF PRISONS, & DEPARTMENT OF JUSTICE OF THE U.S.,
Respondents-Appellees.

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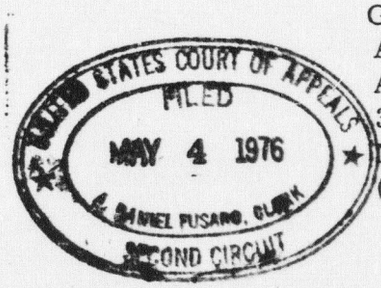
P/S

BRIEF FOR PETITIONER-APPELLANT

APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF CONNECTICUT



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PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the District of Connecticut,(Newman, J.) entered on March 4, 1976, dismissing, without a hearing, petitioner-appellant's petition for a writ of habeas corpus challenging the denial of his parole.

Petitioner-Appellant remains incarcerated pursuant to his judgment of conviction.

SUMMARY OF ARGUMENT

Petitioner is presently serving a five year sentence imposed upon him after his plea of guilty to a charge of conspiring to bribe a juror (18 USC §1503).

He is being denied parole, however, not because of that conviction but because it is alleged he was "the head of an organized gambling operation that involved the bribery of policemen to protect illegal gambling activities" (Decision of Regional Director of 1/21/76).

It is contended that the denial of parole based on this prior charge was illegal for the following reasons: (1) It was improper to refer to this charge to determine petitioner's "offense behavior" and to designate his case "original jurisdiction" under 28 C.F.R. §2.17 (a), (b)(2); (2) It was improper to use this charge to raise his "offense severity" from moderate to high (28 CFR §2.20); (3) It was improper to use this charge to reduce his "salient factor" score from very good (10) to good (8) (28 CFR §2.20); (4) It was improper to use this charge to justify extending his incarceration beyond the "guidelines" (28 CFR §2.20 [c]); (5) Assuming arguendo, that this charge could play <u>some</u> part in the Parole Board's decision, it was <u>quadruple</u> "jeopardy" to use it in all the ways set forth in items (1) - (4); and (6) This charge is factually incorrect and is, indeed, refuted by a decision of this very Court.

Furthermore, the dismissal of the instant writ without the benefit of a hearing at which these issues, and especially item (6) could be explored, was error.

STATEMENT OF FACTS

In January, 1972 petitioner received a three (3) year sentence upon his conviction of conspiracy, to aid interstate gambling (18 USC §1952). After his conviction was affirmed by this Court (see United States v. Cassino, 467 F 2d 610 [2d Cir. 1972]) he entered Danbury FCI on May 14, 1973, to begin serving his sentence.

On October 9, 1973, petitioner received a five (5) year sentence on his plea to conspiracy to influence a juror (18 USC §1503). This sentence was concurrent with the prior three (3) year sentence, but the concurrency commenced on October 9, 1973. Accordingly, the Bureau of Prisons treated petitioner as having an aggregated sentence of five (5) years, four (4) months and twenty-four (24) days from May 14, 1973.

On or about July 12, 1974 appellant was placed on the "Special Offender" list because of his alleged connection with organized crime. Accordingly, when he appeared for his first parole hearing in 1975 he was declared an " original jurisdiction" case (28 C.F.R. §2.17) and denied parole, because of his " Special Offender" status.*

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* It is counsel's understanding that "special offender" is a Bureau of Prisons designation while "original jurisdiction" is a Parole Board designation. Clearly, however, they are merely different labels for describing the same thing. See Billiteri v. Board of Parole, 391 F. Supp. 260, op. after hrg. 400 F. Supp. 402 (W.D.N.Y. 1975) (presently sub Judice before this Court).

In October 1975, he filed the instant petition to have the "Special Offender" designation removed and to obtain a new parole hearing. The government conceded that the designation had been imposed in violation of Cardaropoli v. Norton 523 F2d 990 (2d Cir. 1975) and on December 19, 1975 a new parole hearing was held.

At the very outset of this hearing petitioner's counsel, acting as his representative, pointed out that petitioner was not serving the interstate gambling sentence because he had "maxed out" on that charge in May, 1975 (H.S.).* Inclusion of this charge in a determination of petitioner's "offense behavior" was objected to (H 9-10) but the examiners devoted the next six pages of the hearing to questioning petitioner about it (H. 9-15). He denied that he was the head of the gambling ring and directed the examiners attention to the prosecutor's summation where he "agreed wholeheartedly with the undercover agent that I had no part of the gambling operation. That I was just a friend of Mr. Variano". (H. 11)**

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* A transcription of the minutes of this hearing ("H") was received after the Index to the Record on Appeal had been prepared. Accordingly they will be included in a Supplemental Appendix. Counsel apologizes for the incompleteness of the transcription, which is due to the quality of the recording tape.

** At petitioner's trial Joseph Colligan, an undercover agent, testified to a conversation with Peter Variano (Variano was the head of the gambling ring and had pleaded guilty before trial). The conversation, set forth in United States v. Cassino, 467 F2d 610, 614 (2d Cir. 1972), is as follows:

> " At the weekly meeting of October 22, 1969 Variano told Colligan something of his relationship with Rattenni. 'He [Variano] then went on, he said to me [Colligan], "People are always trying to relate me as a partner of Nicholas Rattenni's. He stated that this wasn't so, that Nick Rattenni was in the refuse business, and at times he fronted money for him, if he was hit hard on a gambling hit, that he would --if he needed $20,000, 25,000 on a Monday morning or any day where he is hit hard on his books, that the man would give him the money.' (emphasis added)

Petitioner kept insisting "all you have to do is read your own minutes in the case, the Government" (H. 14)* Petitioner re-iterated that the government's own witness had said that petitioner was not part of the gambling operation, but the examiners response was "we must still go on a basis . . . that found you guilty of some role in this interstate gambling operation." (H. 21-23)

Petitioner's representative repeated that he believed the Parole Board had no right to consider this crime in deciding if petitioner should be paroled (H. 26-29).

With regard to the sentence he was presently serving, petitioner said he pled guilty because he was told he would receive a concurrent three year sentence (H. 15). The "crime" actually consisted of one of petitioner's co-defendants speaking to the brother or nephew of a juror but the juror was never even contacted. It was, at most, "an attempt to conspire to bribe a juror" (H. 27-29).

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* Petitioner's representative said "It is right there in the record. He is not trying to make you believe it out of his own mouth - - but trying to make you read the record" (H. 27).

Petitioner's representative concluded:

> It's quite evident that since prior -- since you had already decided to classify Mr. Rattenni in the category for his crimes of high severity before yourself and Mr. Kruger even had a moment to confer about it - - in fact, after you made your statements you never once conferred with Mr. Kruger, you just made your finding that he was in a high severity category without any due process, without any real investigation, with simple acceptance of certain statements from some erroneous reports which we are ready, willing and able to rebut. And I can't do that in five minutes. That's obvious. (H. 28-29)

On January 8, 1976 the hearing examiners rendered the following decision:

> "Your case has been designated as Original Jurisdiction and referred to the National Directors for their decision.
>
> Your offense involved an unusual degree of sophistication and planning and was part of a large scale criminal conspiracy and a continuing criminal enterprise."*

Petitioner appealed to the Regional Director who, on January 14, 1976, rendered the following decision:

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* The "offense" referred to herein is obviously the interstate gambling charge, not the juror bribery charge.

"Continue to Expiration.

> Your offense behavior has been rated as high severity because you committed two separate offenses. You have a salient factor score of 8. You have been in custody a total of 32 months. Guidelines established by the Board for adult cases which consider the above factor indicate a range of 20-26 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a decision at this consideration above the guidelines appears warranted because you were the head of an organized gambling operation that involved the bribery of policemen to protect illegal gambling activities."

After each of these decisions was received, petitioner filed papers supplementing his original writ and contending that the "new hearing" had been a sham as well as legally defective.

By order dated March 2, 1976 Judge Newman dismissed the writ without a hearing in an opinion* which held, in essence, that the Parole Board's use of petitioner's prior conviction had been correct in all respects **

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* This opinion is set forth in full in the Appendix.

** To forestall any claim of failure to exhaust administrative appeals, petitioner appealed the hearing panel's decision both to the Regional Director (as voted above) and to the National Appellate Board. On April 20, 1976 the Board telephoned counsel and advised that they were upholding the lower decisions (no formal order has been received).

POINT I

THERE WAS NO BASIS IN FACT FOR THE CONCLUSION THAT PETITIONER WAS THE "HEAD" OF AN ORGANIZED GAMBLING OPERATION.

Petitioner has been denied parole because of the assertion that he was the "head" of an organized interstate gambling conspiracy. Since there was no basis in fact for this assertion and since it is indeed refuted by the available records, it was improper to deny parole for this reason.*

During the "hearing" of December 19, 1975, the examiners read to petitioner a portion of his pre-sentence report which stated that there was an "organized gambling syndicate headed by defendant Rattenni and supervised by defendant [Variano]" (H. 10-11).

The decision of the Regional Director** was that petitioner was to be denied parole

> "Because you were the head of an organized gambling operation".

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*Although there is no reference in the Regional Director's decision denying parole to a general claim that petitioner is connected with organized crime, it is clear that the board holds such a belief and that it played a part in the denial.

Petitioner was questioned at both the original and "new" parole hearings about such connections and he denied them. However, the language of both hearing examiner panels in denying parole was the language used in organized crime situations. See Billiteri v. U.S. Board of Parole, 391 F. Supp. 260 (W.D.N.Y. 1975). In fact, the history of the denial of parole in this case strikingly parallels that in Billiteri where the court found that, despite the Board's disclaimers, unsubstantiated hearsay allegations of organized crime connections had been used to deny parole.

Although the use of the organized crime allegation does not appear on the face of the decision denying parole, that allegation clearly played a part. Everything said about the erroneous use of the "head" allegation applies with equal force to this charge.

**Upheld by the National Appellate Board, see preceding footnote.

However, the very decision of this Court affirming petitioner's conviction refutes this assertion.*

The testimony of Joseph Colligan, the undercover agent, was that Variano told Colligan that although people kept trying (and, apparently, are still trying) to make petitioner a partner of Variano's "this wasn't so". United States v. Cassino, 467 F.2d 610, 614 (2d Cir. 1972). Petitioner apparently would advance money to Variano and, in return, apparently took it upon himself to advise Variano as to how the gambling operation ought to be run. Id at 617. This activity was barely sufficient to make him a member of the conspiracy, but contains no facts which would justify calling him the "head".

This Court found that the evidence against petitioner's co-appellants was clearly sufficient to show that they were members of the conspiracy. The most that could be said about petitioner was that the evidence permitted a conclusion that there was a "working relationship" between petitioner and Variano, that petitioner was "associated with" Variano and that they were more than "drinking companions". Ibid.

This Court has never been loath to label a conspirator as the head

*This case would not be the first in which erronrous information in a presentence report caused the improper denial of parole. In Billiteri, supra, the Board's reliance on an incorrect presentence report led to an evidentiary hearing and a court-ordered release.

or leader of a conspiracy where the evidence justified such a conclusion. In petitioner's case, however, the most that Judge Moore was willing to do was to apply the language of the conspiracy participation cases to petitioner* and to negate the assertion that petitioner was only Variano's "drinking companion"**. That petitioner was more than Variano's "drinking companion" does not mean that he was the "head" of Variano's gambling operation, and this Court did not hold that he was the latter.***

Petitioner had originally been designated a Special Offender and denied parole because of the interstate gambling charge. The Government had later conceded that the Special Offender designation was improper and petitioner had "maxed out" on the gambling charge before the "hearing" of December 19, 1975. Petitioner's representative therefore believed that petitioner would no longer be confronted with this charge. Cf. Billiteri, supra, 391 F. Supp. at 263. The failure of the hearing examiners to give petitioner advance notice that they would rely heavily on this charge prevented adequate preparation for a reply or a rebuttal. The refusal of the examiners to give petitioner's representative a meaningful opportunity to reply to the

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*Id at footnotes 17-19.

**Id at footnote 20.

***At p. 6 of his decision, Judge Newman quotes from the Regional Director's determination that petitioner was the "head" of the conspiracy and then cites "See United States v. Cassino, supra." As demonstrated above, the Cassino case, by negative implication, states that petitioner was not the head of that conspiracy.

use of this charge makes the erroneous reliance on the prior conviction even more invidious. See Project: Parole Release Decision-Making and the Sentencing Process, 84 Yale L.J. 810 (1975).

The lower court held that since petitioner could "supplement the hearing record by submitting transcript, appellate decision, and other written information" during any administrative or legal appeals "further inquiry into possible infirmities at the hearing [is] unnecessary" (Decision at 6, ftnt. 1).

Since petitioner has an almost insurmountable burden to overcome once the examiners have denied him parole, (see Project, supra, at 828 n. 90), this opportunity to supplement the hearing record is largely illusory. Furthermore, petitioner's counsel have repeatedly urged the parole authorities and the District Court to read the minutes of petitioner's trial and the decision of this Court which demonstrate the error of using the gambling charge to deny parole. Neither the Regional Director nor the National Appellate Board gave any indication that they had done so and, as noted, the lower court erroneously cited the Cassino decision as supporting the denial of parole.*

*Petitioner and petitioner's counsel have continually stated that the prosecutor's summation in the gambling trial contains a concession that petitioner was not the "head" of the conspiracy. Counsel searched the files in the Southern District Clerk's office for the transcript only to be advised that it was in the "archives" in Bayonne, New Jersey. Counsel and petitioner's family have repeatedly asked petitioner's trial counsel (Roy Cohn) for a copy of the transcript (which is petitioner's property), but Mr. Cohn has not furnished it. Present counsel called counsel for petitioner's co-appellants for a copy of the transcript but his calls have not been returned. The United States Attorney's Office for the Southern District of New York initially agreed to give counsel a copy but then refused. Because of other engagements counsel have been unable to go to Bayonne and search the record for the prosecutor's concession. However, counsel represents that this will be done and both appellee and this Court will be provided with copies of the relevant portions of the transcript.

Petitioner's interest in parole is entitled to due process protection. United States ex rel Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925, 928 (2d Cir.), vacated as moot sub nom. Regan v. Johnson, 419 U.S. 1015 (1974). The denial of parole for a factually incorrect reason is a denial of due process requiring the setting aside of the denial. Id at 934; Billiteri v. United States Board of Parole, 385 F.Supp. 1217 (W.D.N.Y. 1974); cf Morrissey v. Brewer, 408 U.S. 471, 484 (1972); United States v. Tucker, 404 U.S. 443 (1972). Since that is what happened here, petitioner must be admitted to parole.*

*By the date of the argument of this appeal, petitioner will have been in prison for 37 months. That figure is 11 months over the guideline figure the Parole Board contends is proper for petitioner's case and 21 months over the figure petitioner contends is proper (see Points III-V, infra). Petitioner will be due for mandatory release in November 1976.

The only basis ever suggested by the Parole Board for extending his incarceration beyond the guidelines will be removed if this Court agrees with Point I. It would be heartless to send petitioner back for a new hearing and he should be ordered released, Billiteri v. Board of Parole, supra, or at least, admitted to bail pending any new hearing.

POINT II

IT WAS IMPROPER TO USE THE GAMBLING CONSPIRACY CHARGE TO DETERMINE PETITIONER'S OFFENSE BEHAVIOR AND TO DESIGNATE HIS CASE " ORIGINAL JURISDICTION"*

Under 28 CFR §2.17 (b)(2) an individual's case may be designated "original jurisdiction" only if his " offense behavior" involved an unusal degree of sophistication and planning or was a part of "organized crime". It is petitioner's contention that his "offense behavior" was his "commitment offense", i.e., attempted bribery of a juror, not the gambling charge, and that his "offense behavior" did not, therefore, involve any of the factors set forth above. Accordingly, using the gambling charge to determine offense behavior and to designate his case original jurisdiction was improper and denied petitioner due process of law.

The hearing examiners designated petitioner's case "original jurisdiction" because:

> "Your offense involved an unusual degree of sophistication and plan-

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* As in Point I, everything said with regard to the Board's use of the gambling charge applies with equal force to its use, sub silentio, of the organized crime allegations.

ning and was part of a large scale criminal conspiracy and a continuing criminal enterprise" (Decision of Hearing Examiners of 1/8/76).

Clearly, the "offense" referred to herein was the gambling charge which petitioner was no longer even serving. The language used is that of §2.17 (b) (2) (with "and" substituted for "or"), just as the language used to deny him parole while in Springfield matched that used for denial of parole in earlier original jurisdiction cases under 28 CFR §2.13 (b) (1) *

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* The decision of the Regional Director of March 11, 1975, the one successfully challenged because of the improper "special offender" classification, reads as follows:

"Your offense behavior has been rated as high. You have a salient factor score of 8. You have been in custody a total of 20 months. Guidelines established by the board for adult cases which consider the above factors' indicate a range of 20-26 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that decision above the guidelines at this consideration appears warranted because your release at this time would depreciate the great seriousness of the offense committed and thus is incompatible with the welfare of society."

This language has since been condemned as boilerplate and insufficient to deny parole. Billiteri, supra, 400 F Supp. at 403.

There is no support in the guidelines for using any offense but the offense to determine offense behavior. In fact, if anything may be gleaned from the guidelines it is that only the commitment offense may be so used. In the exercise of its discretion to grant or deny parole the Board may consider "prior criminal record". 28 CFR §2.19 (c). In determining the salient factor score the Board may consider prior convictions. See Table for Salient Factor Score, Items A-C, appearing after 28 CFR §2.20. Using only the commitment offense to determine offense behavior and original jurisdiction designation also makes sense because that offense is the most recent. Since an original jurisdiction designation must have a "basis in fact", only the most current of crimes could justify it. See, e.g. Massielo v. Norton, 364 F. Supp. 1133, 1135 (D.C. Conn. 1973).*

Furthermore, in Billiteri v. U. S. Board of Parole, 391 F Supp. 260 (W.D.N.Y., 1975) the court referred interchangeably to "offense behavior"

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* The pitfalls into which the Board can fall if it tries to use non- commitment offenses to determine offense behavior are amply illustrated by the present case. If the gambling conspiracy was an organized criminal activity, it ceased to be so in 1969 - over 7 years ago! One who was or may have been a member of organized crime that long ago could not legally be denied parole now since that status would not have a present "basis in fact." Ibid.

and "offense severity", and that latter is determined solely by the commitment offense. (See Point III, infra)

The lower court never addressed itself to whether a non-commitment offense could determine offense behavior because it held that:

> 'The original jurisdiction designation, unlike the 'special offender' classification, has not been demonstrated to occasion 'grievous loss', since the substantive standards for parole release remain the same" (Decision at pp. 7-8).

It is respectfully submitted that this is simply not true. First of all, as noted, "special offender" and "original jurisdiction" are, at least in the circumstances of this case, different labels for the same thing - a connection with organized crime.* Secondly, as with the "special offender" label (Cardaropoli v. Norton, 523 F2d 990 [2d Cir., 1975]), the original jurisdiction designation engenders "grievous loss" as it "adversely affects the chances for early parole." Massielo v. Norton, 364 F. Supp. 1133, 1135 (D.C. Conn. 1973). See,

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* Under 28 CFR §2.17 (b) there are four possible categories for original jurisdiction cases. Only subdivision (2) fits petitioner's case and that is the organized crime category. See Billiteri, supra, where the court coined the shorthand phrase "oj/ oc" for "original jurisdiction based on organized crime." 391 F Supp. at 261

also Billiteri, supra, 391 F. Supp at 264. The fact that all original jurisdiction cases must go to the National Appellate Board operates as a built-in delay even if the decision is favorable. Lastly, the reality of the situation is that "oj/oc" cases are almost always "continued to expiration" regardless of their institutional record, whether they have exceeded the guidelines, etc. See, e.g., Billiteri, supra.

In sum, only the commitment charge may be referred to in determining whether an original jurisdiction designation is proper. Secondly, such a designation may not be made unless a "due process type" hearing is afforded the prisoner (See Point VII, infra). Since the designation was imposed without such a hearing and based upon improper information, it must be set aside*

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* Once again, it is contended that if this is done there must be a release rather than a remand for yet another parole hearing. See last footnote in Point I.

POINT III

IT WAS IMPROPER TO USE A NON-COMMITMENT OFFENSE TO RAISE PETITIONER'S OFFENSE SEVERITY FROM MODERATE TO HIGH.

Petitioner is presently serving a five year sentence for conspiracy to bribe a juror, a crime which would be in the "moderate" offense severity category in the guidelines to 28 C.F.R. §2.20. However, by reaching into the past to consider a prior crime the Board raised petitioner's offense severity to high. It is petitioner's contention that this was improper.*

The guidelines speak in terms of "offense" characteristics and "offense " behavior, i.e., in the singular. Footnote 4 states that "If an offense behavior involved multiple separate offenses, the severity level may be increased". However, that clearly covers a situation where a prisoner was convicted at the same time of multiple offenses, e.g.,

*Since the Board decided to go outside the guidelines, it may seem irrelevant to argue that the guidelines were improperly determined or utilized. Such a showing, however, strengthens petitioner's other claims of abuse by the Board, such as using erroneous information to deny parole, continuing to consider him a "special offender", denying him a meaningful hearing, etc. In other words, it supports petitioner's contention that the Board is irrationally pre-disposed to keep him in prison for as long as it can, and will use any method to do so.

possession and sales of drugs, and is presently serving those terms.* Section 2.13(b)(1), originally put forth as the reason for denying parole, also speaks of the "offense [singular] committed."

It is interesting to note that the first two decisions denying parole spoke in termsof a single offense and only the most recent stated that both the gambling and juror charges were being used to determine offense severity.

In Battle v. Norton, 365 F.Supp. 925 (D.Conn. 1973) the court seemed to be saying that only the commitment offense could be considered in determining offense severity.

Aside from the issue of whether the guidelines themselves require the use of only the commitment offense, the use of other offenses raises serious problems. Since other offenses are specifically to be used to lower the salient factor score, their use in raising offense severity creates double jeopardy problems (see Point VI). Since the petitioner pled to this crime expecting to be considered for parole only with respect to this crime, denying him parole based on an earlier crime may undermine the validity of the plea.

*The lower court cited this footnote, 28 C.F.R. §2.20(d) and Lupo v. Norton 371 F.Supp. 156 (D.Conn. 1974) as support for the use of the gambling charge. As shown, the footnote does not support this use. Section 2.20 does state that an offense severity may be changed due to "aggravating circumstances", but petitioner contends that this means aggravating circumstances of the commitment offense. Even if other offenses could be used they would have to be of such a character as to justify the use of the term "aggravating", e.g., armed robbery as in Lupo. An interstate gambling charge, for which petitioner received only three years on an exposure of fifteen, can not be considered an aggravating circumstance (especially when petitioner's part in it is made clear, see Point I).

Kortness v. United States, 514 F.2d 167 (8th Cir. 1975); Billiteri v. United States Board of Parole, 400 F.Supp. 402, 408-09 (W.D.N.Y., 1975). Cf. Slutsky v. United States, 514 F.2d 1222 (2d Cir. 1975) (resentence may be required where intention of sentencing court is disregarded by actions of Board of Parole). Since very few crimes are listed in the guidelines and since there is neither an explanation for the categories nor standards for determining where unmentioned crimes are to be placed, using non-commitment crimes increases the possibility of arbitrary and capricious action by the Board. Billiteri, supra, 400 F.Supp at 407.*

If the commitment crime determined offense severity, then even if the salient factor remained the same, the guidelines would indicate release in 16-20 months. Since petitioner has served almost double the high side of this figure, the Board would be more hard-pressed to justify his continued incarceration.

*Where, as here (see preceding footnote) the Board is being accused of bad faith in the denial of parole, the lack of standards is particularly troublesome.

The failure of the lower court to hold a hearing at which both the bad faith and the standards could be explored is, therefore, particularly harmful.

POINT IV

IT WAS IMPROPER TO USE THE GAMBLING CHARGE TO REDUCE PETITIONER'S SALIENT FACTOR SCORE FROM VERY GOOD TO GOOD.

Petitioner recognizes that Items A & B on the Salient Factor Score explicitly permit the reduction of points for prior convictions and commitments. Petitioner contends, however, that the use of the gambling charge in computing this score was error in this case, because since the charge had already been used to raise his offense severity (Point III) its use again constituted double punishment (Point VI). CF Lupo v. Norton, 371 F. Supp. 156, 163 (D. Conn., 1974).

POINT V

IT WAS IMPROPER TO USE THE GAMBLING CHARGE TO JUSTIFY EXTENDING PETITIONERS INCARCERATION BEYOND THE GUIDELINES.

Petitioner concedes that under 28 CFR §§ 2.19 (c) and 2.20(d) the Parole Board may consider offenses other than the commitment offense in determining whether to extend a prisoner's incarceration beyond the guide-

lines.* However, as in Point IV, petitioner contends that once the gambling charge was used for another purpose, e.g., to raise offense severity, it could not be used in any other way to deny parole. See, e.g. Lupo v. Norton 371 F. Supp. 156, 163 (D Conn. 1974) where this type of action by the Board was condemned as follows:

> " It is simply irrational for seriousness of the offense to be used first to determine the appropriate guideline period and then to be used again as the stated reason for confining a prisoner beyond that guideline period".

Furthermore, even if the Board could look to petitioner's prior record to extend his incarceration beyond the guidelines, it could only do so if that record constituted an aggravating circumstance. In other words, not every prior crime would be sufficient to constitute an aggravating circumstance and the ex-

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* This is not inconsistent with the contention made in Point III that §2.20 (d) does not authorize the use of non-commitment offenses to raise offense severity. The relevant part of §2.20 (d) reads:

> [A]ggravating circumstances in a particular case may justify a decision or a severity rating different from that listed"

"Aggravating circumstances" re: offense severity rating refers to the circumstances of the commitment offense; "aggravating circumstances" re: a decision to grant parole refers to all of the factors listed in the prior section (2.19) including prior criminal record (2.19 [c]).

tention of incarceration because of the existence of any prior record would be an abuse of discretion.

The lower court recognized this by h ding that petitioner's gambling conviction constituted an aggravating circumstance only because he was the "head" and played a "central" and "key" role therein (Decision at pp 6-7, A 81-82). Since it has been demonstrated he did not have any such role (Point I) the prior crime is neither an aggravating circumstance nor a valid reason for incarceration beyond the guidelines.

POINT VI

THE MULTIPLE USE OF THE GAMBLING CHARGE DENIED PETITIONER DUE PROCESS OF LAW

Assuming that the gambling charge could play some part in the Parole Board's decision as to whether or not to grant petitioner parole, its use to (1) designate his case "original jurisdiction", (2) raise his offense severity, (3) lower his salient factor score and (4) extend his incarceration past the guidelines, was such an outrageous multiple punishment for the same act that it constitutes a deprivation of due process of law.

In L[illegible] v. Norton, 371 F. Supp. 156 (D. Conn., 1974) a writ was conditionally granted where the Board of Parole only used a non-commitment offense twice. Where, as here, it was used four times relief is even more necessary.

The lower court addressed itself to this quasi-double jeopardy argument only in the context of a dual use, i.e., to raise offense severity and extend incarceration past the guidelines, and said "this practice would appear to include weighing the prior conviction twice" (Decision at pp. 6-7, A 81-82). The court upheld this practice because the second use was not of the fact of the prior conviction but petitioner's allegedly central role therein (Ibid).

This resolution of the issue was defective for two reasons. Firstly, as noted, there were four uses of this prior conviction, two of the fact of the conviction and two of petitioner's alleged role therein. Secondly, the facts concerning petitioner's role in the gambling conspiracy were erroneous. (see Point I)*

The right not to be designated an "original jurisdiction" case and the right to parole are rights of which a prisoner may not be deprived in a fashion lacking due process of law. Massiello v. Norton, 364 F. Supp. 1133 (D. Conn., 1973). Since that was precisely what was done here, via the multiple-jeopardy use of a single prior conviction, the Board's decision must be set aside.

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* The lower court also asserted that multiple use of the prior conviction was irrelevant since the Board could have "justified petitioner's incarceration beyond the guideline by the single reference to his key role in the gambling enterprise without ever having adjusted his offense behavior severity above moderate" (A. 82). Since it has been demonstrated that petitioner did not play a key role in this operation, this assertion must fail.

POINT VII

THE DISMISSAL OF THE WRIT WITHOUT A HEARING WAS REVERSIBLE ERROR.

Petitioner would respectfully suggest that he has demonstrated that the "facts" relied on both to deny him parole and to dismiss the instant petition are, simply stated, not true. At the very least, however, it has been shown that a serious question exists as to the role petitioner played in the gambling operation, the circumstances surrounding the attempt to influence a juror*, whether he has (assuming he once had) any ties to organized crime, etc., etc.

Also presently unknown is the extent to which the Board relied upon, but did not so state in their written "Notices of Action", the allegations of petitioners ties to and involvement in organized crime. Did the Board ever follow up on petitioner's request that they read a portion of the gambling trial transcript? What are the specifics of the adverse allegations in the pre-sentence report?

The hearing before the panel on December 19, 1975 was clearly inadequate to permit the resolution of these issues.** Petitioner and his

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*A crime of which his co-defendants who went to trial were acquitted!

**Petitioner was afforded neither the minimum due process procedures mandated by the Supreme Court in Morissey v. Brewer, 408 U.S. 471, 489 (1972) nor those set forth by this Court in Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975). Although neither of these cases involved an original jurisdiction designation nor the denial of parole, both of these matters have now been determined to be protected rights deserving of similar due process (United States ex rel Johnson v. Chairman, New York State Board of Parole, supra; Massiello v. Norton, supra). Since petitioner has asked for an evidentiary hearing in open court these procedures are merely referred to in order to demonstrate their absence at the parole hearings. A further defect in the hearing of December 19, 1975 is that "the transcript...is almost valueless". Cf BILLITERI, supra, 391 F.Supp at 263. The transcript of a hearing in court would not suffer from this defect.

representative were surprised at the continued reliance of the Board on the gambling charge and did not have adequate time to respond or present rebutting documents. The pre-sentence report was not disclosed and the vague allegations referred to therein were not detailed enough to be intelligently responded to. Petitioner's representative was given only five minutes to present petitioner's case. Even this time seemed illusory because the hearing examiners had already made up their minds. Petitioner was not given an opportunity to appear before the Regional Director although in original jurisdiction cases his is really the controlling decision (Cf. Billiteri, supra, F. Supp at 263).

The ways of the Parole Board are still largely a mystery to lawyers, judges, and prisoners. Cf. Lupo v. Norton, 371 F. Supp. 156, 161 (D. Conn 1974). Even where courts have directed new parole hearings evidentiary hearings in court have still been necessary to determine what the parole board really did. See, e.g. Billiteri, supra.

Petitioner believes that he had demonstrated that there was and is no basis in fact wither for an original jurisidction designation or for a decision outside the guidelines, and that he should be ordered released. Id. If this court choose to require a new hearing, either in court or before the Parole Board, petitioner begs the Court to admit him to bail so that any victory he does obtain is not a wholly phyrric one.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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NICHOLAS RATTENNI,

Petitioner,

AFFIDAVIT OF SERVICE BY MAIL

- v -

ATTORNEY GENERAL OF THE U.S., BOARD OF PAROLE, BUREAU OF PRISONS, DEPARTMENT OF JUSTICE OF THE U.S., GEORGE C. WILKINSON, Warden, Federal Correctional Institution, Danbury, Connecticut,

Respondents.

----------x

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

Ida LaBrocco, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 56-36 Remsen Place, Maspeth, New York.

On May 4, 1976 deponent served the within Brief (3 copies) and Appendix (1 copy) upon United States Attorneys Office, attorneys for Respondent in this action, at 915 Lafayette Boulevard, Bridgeport, Connecticut, the address designated by said attorneys for that purpose by depositing true copies of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Ida LaBrocco
IDA LaBROCCO

Sworn to before me this

4th day of May, 1976.

Helen Costello
Notary Public

HELEN COSTELLO
Notary Public, State of New York
No. 24-4519527
Qualified in Kings County
Commission Expires March 30, 1978

UNITED STATES DISTRICT
COURT
DISTRICT OF CONNECTICUT

NICHOLAS RATTENNI,

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- v -

ATTORNEY GENERAL OF THE
U.S., et al.,

Respondents.

AFFIDAVIT OF SERVICE
BY MAIL

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CONCLUSION

FOR THE ABOVE-STATED REASONS THE ORDER APPEALED FROM MUST BE REVERSED AND PETITIONER RELEASED ON PAROLE

Respectfully submitted

GINO E. GALLINA
30 Broad Street
New York, N.Y. 10004

JOEL A. BRENNER
of Counsel.